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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

MARKUS ANDREW FALIANO,

Defendant and Appellant.

G057007

(Super. Ct. No. 18WF1080)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Gary S. Paer, Judge. Affirmed.

Kristen Owen, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

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A jury convicted defendant Markus Andrew Faliano of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)), a metal sign. The court sentenced him to two years in prison, and he appealed from the final judgment.

We appointed counsel to represent defendant on appeal. Counsel filed a brief summarizing the proceedings and facts of the case and advised the court she found no arguable issues to assert on defendant's behalf. (*Anders v. California* (1967) 386 U.S. 738 (*Anders*); *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*).) To assist us in our independent review, counsel suggested we consider whether: (A) There were any sentencing errors; (B) The court should have given a unanimity instruction as to which object was the deadly weapon, i.e, the chair or the metal sign; and (C) Whether there was sufficient evidence the metal sign was a deadly weapon.

Counsel and this court notified defendant he could file a supplemental brief on his own behalf. However, we received no supplemental brief from him and the time to file one has passed.

We have independently reviewed the entire record as required under *Anders, supra*, 386 U.S. 738 and *Wende, supra*, 25 Cal.3d 436, and we have found no arguable issues on appeal. Therefore, we affirm the judgment.

## **FACTS**

### *1. The Prosecution Case*

Adalberto Julian went to a liquor store in Garden Grove to purchase Gatorade. When Julian left his car, he noticed defendant on his phone. Defendant looked at Julian "wrongly." Defendant approached Julian and yelled at him in English. Julian only spoke Spanish. Julian understood only the bad words. He also understood defendant to say something about having him arrested. Defendant's face got very close to Julian. Julian pushed away defendant. Prior to the push, defendant made no physical contact with Julian.

Julian attempted to walk away from defendant. Defendant followed, and Julian pushed defendant. Defendant kicked him in the face with a roundhouse kick and punched him. Julian backed away and crossed a street to get away from defendant.

Defendant followed Julian and kept hitting him near Kaye's Kitchen. Julian grabbed a chair from Kaye's Kitchen to protect himself. Julian dropped the chair. Defendant grabbed the chair and threw it at Julian. Defendant grabbed several chairs and threw them. One chair hit Julian and caused him some pain.

Julian continued to try to walk away, and defendant followed. Julian picked up a metal sign and dropped it. Defendant attempted to pick up the metal sign. They wrestled over it. Julian let go to move away. Defendant picked up the sign and threw it at Julian. It hit him on the hand and hurt.

Julian went back across the street toward the restaurant. The cook, a waiter and a customer subdued defendant. The police arrived.

The waiter said defendant was the aggressor. The waiter described Julian picking up the sign and swinging it a few times, but mostly using it as a shield. Julian threw the sign at defendant. Defendant picked it up and threw it at Julian. Vania McBride, a customer, agreed defendant was the aggressor.

Officer Efrain Jimenez stated Julian told him he was going to the liquor store to buy some beers. Jimenez described the metal sign as three feet by four feet and weighing 25 to 30 pounds. The edges and points were sharp. The sign could cause injury. The cut on Julian's hand did not require medical attention. Defendant told Jimenez he was trying to make a citizen's arrest on Julian for possible drunk driving.

## *2. The Defense Case*

Defendant admitted to pleading guilty in 2014 of taking his father-in-law's car without his permission. On the day of the incident, he was talking on the phone for work near the liquor store. He saw Julian driving down Main Street fast, then park at the

liquor store. Julian stayed in his car a long time. It looked to defendant like Julian was smoking a speed pipe and drinking from small airline liquor bottles.

Defendant sat outside. Julian walked past and stepped on his foot. Defendant said, “Excuse me.” Julian called him a “faggot” and a “bitch” in Spanish. Julian also told defendant to “go fuck his mother.” Defendant stood and approached Julian.

At that point, the video that was shown to the jury captured the events. Defendant said Julian attempted to punch him, and he acted in self-defense. Defendant told Julian he was going to take him to the ground and make a citizen’s arrest. The basis for the arrest was drinking and driving and assault. Julian would not cooperate with the arrest. Defendant was afraid Julian had a weapon.

Defendant kicked Julian in the face. Julian attacked defendant with the sign, but defendant was able to grab it away from him and throw it down. Defendant continued to follow Julian to make the citizen’s arrest. Julian picked up the restaurant chair and was jabbing him with it like a lion tamer. Defendant grabbed a chair and was tackled by five people.

## **DISCUSSION**

Again, we independently reviewed the entire record as required under *Anders, supra*, 386 U.S. 738 and *Wende, supra*, 25 Cal.3d 436, including the issues suggested by counsel, and we found no arguable issues on appeal.

There were no sentencing errors. “Any person who commits an assault upon the person of another with a deadly weapon or instrument other than a firearm shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not exceeding one year . . . .” (Pen. Code, § 245, subd. (a)(1)) The trial court rejected defendant’s probation request and imposed the two-year low term, for the reasons stated on the record, including his lengthy prior criminal conviction history and his poor performance on prior grants of probation. These sentencing choices were well

within the court's broad sentencing discretion. (*People v. Avalos* (1996) 47 Cal.App.4th 1569, 1582; Pen. Code, § 1170, subds. (b) & (c); Cal. Rules of Court, rule 4.406(b).)

There was no unanimity jury instruction error. The court gave CALCRIM No. 3500 as follows: "The defendant is charged with assault with a deadly weapon in Count 1. [¶] The People have presented evidence of more than one act to prove that the defendant committed this offense. You must not find the defendant guilty unless you all agree that the People have proved that the defendant committed at least one of these acts and you all agree on which act he committed." The court had no sua sponte obligation to give a more specific unanimity instruction as to whether the deadly weapon was the chair or the metal sign. (*People v. Estrada* (1995) 11 Cal.4th 568, 574.)

There was sufficient evidence the metal sign was a deadly weapon. "As used in [Penal Code] section 245, subdivision (a)(1), a 'deadly weapon' is 'any object, instrument, or weapon which is used in such a manner as to be capable of producing and likely to produce, death or great bodily injury.'" (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028-1029.) The statute contemplates two categories of deadly weapons: (1) objects that are "deadly weapons as a matter of law" such as dirks and blackjacks; and (2) "Other objects, while not deadly per se, may be used, under certain circumstances, in a manner likely to produce death or great bodily injury." (*Id.* at p. 1029.) A jury could reasonably find the sign falls into the latter category based on the evidence presented in this case.

**DISPOSITION**

The judgment is affirmed.

THOMPSON, J.

WE CONCUR:

ARONSON, ACTING P. J.

GOETHALS, J.